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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CLAUDE KAAIAKAMANU, Defendant and Appellant.	B201030 (Los Angeles County Super. Ct. No. YA064419)

APPEAL from a judgment of the Superior Court of Los Angeles County. James R. Brandlin, Judge. Affirmed as modified.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

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Claude Kaaiakamanu (appellant) appeals from the judgment entered in a court trial of assault by means of force likely to produce great bodily injury and with a deadly weapon (Pen. Code, § 245, subd. (a)(1); count 1)[1] and inflicting unjustifiable physical pain on a person over the age of 70 (§ 368, subd. (b)(1); count 2). The trial court found that as to counts 1 and 2, appellant had personally inflicted great bodily injury on a person he reasonably should have known was 70 years of age or older. (§§ 12022.7, subd. (c); 368, subds. (b)(1) & (2)(B).) As to count 1, it further found that appellant had committed the offense on a person 65 years of age or older (§ 667.9, subd. (a)) and that as to count 2, appellant had personally used a deadly or dangerous weapon (§ 12022, subd. (b)(1)). The trial court sentenced appellant to an aggregate term of eight years in state prison.

Appellant contends that (1) the trial court erroneously made the finding in count 1 that appellant had committed felonious assault on a person 65 years of age or older pursuant to section 667.9, subdivision (a); and (2) the evidence is insufficient to support the finding in count 2 that appellant personally used a deadly or dangerous weapon in the commission of that offense.

The People concede that appellant's initial contention has merit, and we agree. The section 667.9 true finding will be stricken, and the term imposed for the enhancement vacated. However, the evidence is sufficient to support the finding in count 2 of the personal use of a deadly and dangerous weapon. We will affirm the judgment, as modified.

FACTS

I. The Trial Evidence

A. The Prosecution's Case-in-chief

The parties waived a jury trial, and the trial court heard the following evidence.

On March 15, 2006, appellant, his wife Maria, his two young children, and his grandmother, Felipa Ronquilla (Ronquilla), traveled from Hawaii to Torrance to visit

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Albert Estiamba (Estiamba) and his wife Consuela (Consuela), appellant's great aunt and uncle. Consuela and Ronquilla were sisters. Appellant, who was also known as "Butch," was in the Coast Guard, and was about 30 years old. Appellant was well aware that Estiamba was over 70 years old. After dinner, appellant and Estiamba were drinking beer and talking. Estiamba had his red and blue jacket hanging on the back of his dining room chair.

The rest of the family went to bed. Appellant and Estiamba remained downstairs drinking beer and shots of Canadian Club and Crown Royal whiskey. Several hours later, Ronquilla heard a "disturbance" and went downstairs with Consuela. The women found Estiamba lying on the carpet against the French doors, bloody, apparently unconscious, and severely beaten. Blood was everywhere. Appellant was standing near Estiamba apparently intoxicated. He was pounding the table with a bloody whiskey bottle and ranting, raging, and screaming.

Consuela called 911, and the paramedics and police arrived.

Paramedic Stephen Waggoner asked appellant what had happened. Appellant said, "I don't know," and "I just found him this way." Waggoner could smell an odor of alcoholic beverages in the dining room. Waggoner observed that Estiamba was semiconscious. He had suffered blunt force trauma to his face, chin, and head, and his eyes were swollen shut. Waggoner cleared Estiamba's airways of blood and transported him to the emergency room at Harbor-UCLA Medical Center. In Waggoner's opinion, the victim had suffered blunt force trauma to his head before he collapsed to the floor. Waggoner opined that Estiamba's injuries had not been caused by falling and hitting his head on the carpet and the French doors.

Torrance Police Officer Timothy Coffey entered the residence. Officer Coffey found appellant crawling in a hallway on the floor "on all fours" "crying [and] yelling unintelligibly." There was blood on his clothing, and one sock was soaked with blood. Appellant made various "nonsensical comments," and his hands were red. Appellant could not stand up.

Appellant was arrested and taken to the police station. One transporting officer reported that appellant was intoxicated, belligerent, and at times, aggressive. Appellant told the officer that a man with a cape or a "dead guy" had assaulted Estiamba. He also said that Estiamba's wife "might have cut his lip." During the ride to the station, appellant said that he wanted to bite the neck of the transporting officer's female partner.

At about 7:45 a.m. and 11:00 a.m. on March 16, 2006, Officer Tim Stark obtained a *Miranda* waiver and interviewed appellant. (*Miranda v. Arizona* (1966) 384 U.S. 436.) Appellant told the officer that he had arrived from Hawaii the prior day. He was on vacation with his family. They had a family dinner, and appellant had six bottles of beer and four shots of whiskey. Appellant said that the residence had been locked up for the night and that if his great uncle was injured, he must have been the person who did it. He told Officer Stark that he did not remember assaulting Estiamba.

Estiamba also could not recall what had happened.

Estiamba's daughter, Candice, and her husband, Frank Haskell, a San Diego deputy sheriff, arrived at the hospital in Los Angeles early on the morning of March 16, 2006. Shortly thereafter, at her parents' residence, Candice found blood on the dining room carpet and several of her father's teeth on the dining room floor. Candice also found a bloody bottle of Canadian Club whiskey sitting on the kitchen counter next to the sink. Ronquilla told Candice that after the assault, she had removed the items now sitting on the sink, including the bottle, from the dining room table. Candice wrapped the bottle in a plastic bag, and Frank Haskell took it to the police station. On the bottle, the police discovered appellant's fingerprint. DNA profiles from the blood on the bottle indicated that the blood belonged to Estiamba. DNA profiles developed from the blood stains on the jeans appellant had been wearing at the time of the assault disclosed that the blood of the major donor was Estiamba's and that the blood of the minor donor was appellant's.

During the beating, Estiamba had suffered massive blunt trauma injuries to his head and jaw. He had lacerations on his lip, on his scalp near his forehead, under his chin, on an ear, and on his forearm. His upper and lower jaw were broken in a number of

places and one orbital bone was shattered. After his injuries, Estiamba developed pneumonia.

Dr. Benjamin Walline, the maxillofacial surgeon who had operated on Estiamba and put titanium plates into his face to repair his shattered bones, opined that Estiamba had suffered blunt force from multiple vectors. He said that the injuries were consistent with having been punched. The injuries probably were not caused by one blow and were too massive to have been caused by falling off a chair onto the carpeted floor, even if during the fall Estiamba's head had hit the dining room's French doors. The doctor testified that Estiamba had had a 0.236 blood alcohol level at admission. The medical records showed that Estiamba spent 15 days in the intensive care unit before he was released home.

At the time of trial, a year after the assault, the victim was still suffering a loss of the use of his right arm, a loss of sensitivity in his face, he had lost five teeth, and he suffered from a continuously runny nose and frequent nightmares.[2]

B. The Defense

Appellant declined to testify on his own behalf.

Dr. Dow Richards, the director of an emergency room trauma center in Kansas City, Missouri, opined that Estiamba's injuries had been caused by a fall and that the injuries were typical "barstool injur[ies]," i.e., they were characteristic of an intoxicated person having taken an unbroken fall off a barstool onto a hard floor and directly onto his or her face and chin. Dr. Richards claimed that the lacerations did not display the

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[2] At sentencing, Consuela described her husband's injuries more comprehensively. She related that the doctors and nurses at the hospital said that Estiamba's injuries were the worst they had ever seen. During the several days following the beating, Estiamba was close to death. Prior to the beating, Estiamba could drive and was active. Afterwards, he had recurring severe medical problems, he could not get around on his own, and he suffered pain and nerve damage, particularly in his right hand. He could no longer use his right hand, and he was right-handed.

One police officer took photographs of appellant's face. However, there is no description in the record of any injury to appellant's face.

characteristics of injuries inflicted by a liquor bottle. Also, the victim's injuries were not consistent with multiple blunt force trauma.

During cross-examination, Dr. Richards conceded that Estiamba's injuries were too severe to have been caused by a mere fall onto his dining room carpet.

II. The Verdict

After listening to the evidence, the trial court found appellant guilty as charged and made the additional findings of the enhancements alleged in the information. It commented: "There are injuries on the [appellant] which are consistent with being involved in a physical altercation. There is evidence that the [appellant's] fingerprint is found on a bottle which contains the victim's blood." It concluded that it was improbable that the victim's injuries had occurred during a fall, even if during his fall Estiamba's head had struck the wood holding the French door's glass windows in place. It explicitly rejected Dr. Richards's opinion as to the probable cause of the injuries and found that appellant was guilty of a felonious assault with a deadly weapon, "to wit, a whiskey bottle."

DISCUSSION

I. The Section 667.9, Subdivision (a), Finding

Appellant contends that with respect to count 1, the record fails to support the trial court finding of the truth of the one-year section 667.9 enhancement. The People concede the error, and we agree that the one-year enhancement should be stricken from the judgment and the term imposed for that enhancement vacated.

A. The Background

At sentencing, the trial court selected count 2, the infliction of unjustifiable pain on an elder, as the principal term of imprisonment. For count 2, the trial court imposed a lower base term of two years (§ 368, subd. (b)(1)), enhanced by five years for the infliction of great bodily injury on a person 70 years of age or older (§§ 12022.7, subd. (c), 368, subd. (b)(2)(B)) and by one year for the personal use of a deadly and dangerous weapon (§ 12022, subd. (b)(1)), a total term of eight years. For count 1, the felonious assault with a whiskey bottle, the trial court imposed a two-year term, again enhanced by

the infliction of great bodily injury on a person 70 years of age or older (§ 12022.7, subd. (c)) and also by a one-year term for inflicting injury on a person 65 years of age or older (§ 667.9), a total term of eight years. The trial court ordered the terms imposed for count 1 stayed pursuant to section 654.

B. The Analysis

Section 667.9, subdivision (a), provides, as follows: "Any person who commits one or more of the crimes specified in subdivision (c) against a person who is 65 years of age or older, or against a person who is blind, deaf, developmentally disabled, a paraplegic, or a quadriplegic, or against a person who is under the age of 14 years, and that disability or condition is known or reasonably should be known to the person committing the crime, shall receive a one-year enhancement for each violation."

Subdivision (c) of that section enumerates various offenses to which the one-year enhancement applies. Felonious assault is not an enumerated offense within subdivision (c).

As section 667.9 fails to enumerate felonious assault as an applicable felony, section 667.9's one-year enhancement does not apply to the felonious assault here in count 1. Accordingly, we order the concurrent term imposed and stayed for count 1 reduced by one year to a term of seven years. We order stricken the section 667.9 finding and vacate the one-year term imposed for the enhancement.

II. Sufficiency of the Evidence

Appellant contends that the evidence is insufficient to support the trial court's true finding with respect to count 2 that the offense was committed with the use of a deadly or dangerous weapon within the meaning of section 12022, subdivision (b)(1).

The contention lacks merit.

A. The Standard of Review

"'In reviewing the sufficiency of evidence under the due process clause of the Fourteenth Amendment to the United States Constitution, the question we ask is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the [enhancement] beyond

a reasonable doubt."' ([*People v.*] *Rowland* (1992) 4 Cal.4th [238,] 269, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) We apply an identical standard under the California Constitution. (*Ibid.*) 'In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court "must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) The same standard also applies in cases in which the prosecution relies primarily on circumstantial evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 396.)" (*People v. Young* (2005) 34 Cal.4th 1149, 1175; see also *People v. Alvarez* (1996) 14 Cal.4th 155, 225 [applying the same standard of review to an enhancement].)

B. The Analysis

Appellant argues that the evidence is insufficient to support the finding of a one-year enhancement for the use of a deadly or dangerous weapon within the meaning of section 12022, subdivision (b)(1).

We disagree. Appellant's contention amounts to nothing more than an invitation to this court to reweigh the evidence and substitute its judgment for that of the trial court. That is not the function of an appellate court. (*People v. Culver* (1973) 10 Cal.3d 542, 548.)

Subdivision (b)(1) of section 368 provides, as follows: "(1) Any person who knows or reasonably should know that a person is an elder or dependent adult and who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult to suffer, or inflicts thereon unjustifiable physical pain or mental suffering . . . is punishable by imprisonment in a county jail not exceeding one year, or by a fine not to exceed six thousand dollars ($6,000), or by both that fine and imprisonment, or by imprisonment in the state prison for two, three, or four years."

Section 12022, subdivision (b)(1), provides that: "Any person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony

shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, unless use of a deadly or dangerous weapon is an element of that offense."

"There are two classes of dangerous or deadly weapons: instrumentalities that are weapons in the strict sense, such as guns and blackjacks; and instrumentalities which may be used as weapons but which have nondangerous uses, such as hammers and pocket knives. [Citation.] Instrumentalities in the first category are '"dangerous or deadly"' per se. [Citation.] An instrumentality in the second category is only '"dangerous or deadly"' when it is capable of being used in a '"dangerous or deadly"' manner and the evidence shows its possessor intended to use it as such. [Citation.]" (*People v. Burton* (2006) 143 Cal.App.4th 447, 457.) The nature of the injuries may establish the use of a dangerous or deadly weapon. (*People v. Alvarez, supra*, 14 Cal.4th at pp. 179, 225 [personal use of a deadly weapon established where a woman was hit from behind with an unknown object and 20 stitches were required to close the wound].)

The count 1 offense of inflicting unjustifiable injury on a person 70 years of age or older has no element in the abstract of the use of a deadly weapon. Consequently, the use of a dangerous and deadly weapon may apply to a violation of section 368, inflicting unjustifiable pain on an elder. (See *People v. McGee* (1993) 15 Cal.App.4th 107, 114–116; see also *People v. Smith* (2007) 150 Cal.App.4th 89, 94-95; *People v. Chaffer* (2003) 111 Cal.App.4th 1037, 1043–1044.)

Here, the trial evidence established that appellant and his great uncle were drinking beer and Canadian Club and Crown Royal whiskey after the family went to bed. Both men apparently became so intoxicated that it affected their memories of what had occurred. Ronquilla heard a disturbance, and she and Consuela went downstairs to the dining room where the men had been drinking and talking. Estiamba was lying on the ground severely beaten. Appellant was standing next to him at the end of the dining room table near the French doors. Appellant had a Canadian Club bottle in his hand. He was pounding on the table with the bottle and raging incoherently. When the paramedics and the police officers arrived, the officers observed that appellant from time to time

exhibited incoherent and aggressive behavior. Testing revealed that the blood on the bottle of Canadian Club whiskey was Estiamba's.

The trial court explicitly rejected Dr. Richards's opinion with respect to the cause of the injuries. It impliedly accepted Dr. Walline's testimony about the cause of the injuries, and trial counsel never questioned Dr. Walline specifically about whether Estiamba's injuries could have been caused by the bottle or the beating could have only been accomplished by hands and feet. Dr. Walline testified that he was certain that the injuries were inflicted by multiple blows and that the force used to inflict the injuries was massive, of a magnitude similar to the force inflicted during an automobile accident. Based on the injuries and the circumstances, the trial court could reasonably conclude that appellant had used a deadly or dangerous weapon, i.e., the whiskey bottle, when he beat Estiamba.

DISPOSITION

The judgment is modified by striking the section 667.9 finding and vacating the one-year term imposed pursuant to that enhancement with respect to count 1, the felonious assault. In all other respects, the judgment is affirmed.

The superior court shall have its clerk prepare and send to the California Department of Corrections and Rehabilitation an amended abstract of judgment reflecting the modification to the judgment.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD